UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	Chapter 11
Alpha Natural Resources, Inc., *et al.*,	Case No. 15-33896-KRH
Debtors.	(Jointly Administered)

THE UNITED STATES TRUSTEE'S OBJECTION TO DISCLOSURE STATEMENT WITH RESPECT TO JOINT PLAN OF REORGANIZATION OF DEBTORS AND DEBTORS IN POSSESSION DATED MARCH 7, 2016

The United States Trustee for Region Four, which includes the Eastern District of Virginia, Richmond Division (the "United States Trustee"), pursuant to 11 U.S.C. § 1125, and in furtherance of the administrative responsibilities imposed pursuant to 28 U.S.C. § 586(a), hereby objects to the approval of the "Disclosure Statement With Respect to Joint Plan of Reorganization of Debtors and Debtors in Possession" (the "Disclosure Statement").

In support thereof, the United States Trustee represents and argues as follows:

LEGAL FRAMEWORK

1. The basic structure of Chapter 11 of the Bankruptcy Code is a system where a plan of reorganization or liquidation is proposed to the creditors who then vote on whether to accept or reject the plan. 11 U.S.C. §§ 1121, 1125-1129. After the plan is voted upon, the Court determines whether the plan can be "confirmed" by determining

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whether the statutory requirements for confirmation are met. 11 U.S.C. § 1129. Once the plan is "confirmed," it becomes a contract between the reorganized debtors and all of their creditors which replaces all of the debtors' prior obligations. *See, e.g.*, *In re Shenandoah Realty Partners, L.P.*, 287 B.R. 867, 871 (Bankr. W.D. Va. 2002); *In re Lacy*, 183 B.R. 890, 892 n.1 (Bankr. D. Colo. 1995); 11 U.S.C. § 1141.

2. In order to provide creditors with the information necessary to make an informed vote on the plan, the Bankruptcy Code requires the proponent of the plan to provide creditors with a "disclosure statement." 11 U.S.C. § 1125(b). The purpose of the disclosure statement is to provide creditors with information about the debtor, the plan and their treatment thereunder, necessary for creditors to make an informed and reasoned vote. *See, e.g.*, *In re Monnier Bros*, 755 F.2d 1336, 1342 (8th Cir. 1985) ("[t]he primary purpose of a disclosure statement is to give the creditors the information they need to decide whether to accept the plan"); *In re Forest Grove, LLC*, 448 B.R. 729, 737 (Bankr. D.S.C. 2011) ("[t]he purpose of a disclosure statement is to clearly provide creditors with information regarding the debtor's plan and their treatment under that plan"); *In re Phoenix Petroleum Co.*, 278 B.R. 385, 392 (Bankr. E.D. Pa. 2001) ("the general purpose of the disclosure statement is to provide 'adequate information' to enable 'impaired' classes of creditors and interest holders to make an informed judgment about the proposed plan and determine whether to vote in favor of or against that plan").

3. Although precisely what information must be contained in a disclosure statement varies depending on the particulars of the case, a disclosure statement must contain "adequate information," which is defined as:

> [I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records ... that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan.

11 U.S.C. § 1125(a). "Adequate information" for disclosure statement purposes has been described as "all information that is reasonably necessary to permit creditors and parties-in-interest to fairly and effectively evaluate the plan." *In re Robert's Plumbing & Heating, LLC*, Case No. 10-23221, 2011 WL 2972092 at * 2 (Bankr. D. Md., July 20, 2011); *see also In re A.H. Robbins Co., Inc.*, Case No. 98-1080, 1998 WL 637401 at * 3 (4th Cir. 1998) (adequate information means "sufficient information to permit a reasonable, typical creditors to make an informed judgment about the merits of the proposed plan").

4. Although what constitutes "adequate information" varies from case to case, Courts have held that the following types of information should be included in a disclosure statement:

i. The circumstances that gave rise to the filing of the case;

ii. A complete description of the available assets and their value;

iii. The anticipated future income of the debtor;

iv. The source of the information provided in the disclosure statement;

v. The condition and performance of the debtor while in chapter 11;

vi. Information regarding claims against the estate;

vii. A liquidation analysis setting forth the estimated return that creditors would receive under chapter 7;

viii. The accounting and valuation methods used to produce the financial information in the disclosure statement;

ix. A summary of the plan;

x. An estimate of all administrative expenses, including attorneys' fees and accountant's fees;

xi. The collectability of any accounts receivable;

xii. Any financial information, valuations or pro forma projections that would be relevant to creditors' determination of whether to accept or reject the plan;

xiii. Information relevant to the risks being taken by the creditors and interest holders;

xiv. The actual or projected value that can be obtained from avoidable transfers;

xv. The existence, likelihood and possible success of non-bankruptcy litigation; and

xvi. The tax consequences of the plan.

See, e.g., Collier on Bankruptcy ¶ 1125.02[2].

THE DISCLOSURE STATEMENT LACKS ADEQUATE INFORMATION

5. On March 7, 2016, Debtor, Alpha Natural Resources, Inc. and 148 of its affiliated entities (collectively, "Alpha"), filed a "Joint Plan of Reorganization of Debtors and Debtors in Possession," (the "Plan") and an accompanying "Disclosure Statement With Respect to the Joint Plan of Reorganization of Debtors and Debtors in Possession" (the "Disclosure Statement"). (*See* Doc. 1703.[1])

[1] The Plan is attached as Exhibit A to Document 1703 and the Disclosure Statement is attached as Exhibit B to Document 1703.

6. Debtors' Disclosure Statement is insufficient and lacks adequate information.

7. By way of example only, the following deficiencies exist:

The Disclosure Statement Fails to Adequately Describe the Reorganized Debtor

8. Although this case was originally represented to the Court and the creditors as a reorganization, the proposed Plan makes clear that the end-game here is more in the nature of (if not a complete) liquidation.

9. So far, Debtors have sought permission to sell their "non-core" assets, their "core" assets and their "natural gas rights" (*See* Docs. 707, 1646, 2055.)[2] What the Disclosure Statement leaves entirely unclear is what assets are being retained and what business the Reorganized Debtor will conduct.[3] Nowhere in the Disclosure Statement is there any identification of what, if any, assets the Reorganized Debtors will retain after its various sales.

10. With respect to the business the Reorganized Debtor will conduct, at one point the Disclosure Statement indicates that the Reorganized Debtor's "principal purpose" will be "conducting and completing environmental reclamation" – in other words, putting its mining properties back into a safe and environmentally stable state.

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[2] Debtors have also received permission to sell off or abandon certain "non-core miscellaneous real or personal property" that it describes as "relatively *de minimis*" in value as well as its ownership in Rice Energy. (*See* Disclosure Statement at 28.)

[3] This problem is exacerbated by Debtor's failure to include a liquidation analysis or any financial projections. (*See, infra*, ¶¶ 15-21.)

(*See* Disclosure Statement at 2, § I.A.)[4] However, the Disclosure Statement then indicates the proposed Plan will "allow the Debtors' business to restructure as going concerns." *Id.*

11. There is no information about what business these going concerns will conduct, what income or profit (if any) Alpha expects to generate (and the basis for such projections) or any other information that would allow a creditor to determine whether the proposed Plan constitutes the best course of action or whether it is likely to provide the best recovery for such creditors.

12. If, in fact, the Reorganized Debtor is going to conduct no business other than to comply with its statutorily required clean-up and reclamation obligations, and will be essentially winding down Alpha's business, then the Disclosure Statement needs to fully, clearly and openly disclose that.

13. If, on the other hand, the Reorganized Debtor is actually going to continue to operate in some form as a going concern, then that, along with projections as to its income, expenses and potential profits needs to be fully, clearly and openly disclosed.

14. Additionally, without knowing both what assets are remaining after the sales and what business is being conducted after the sale, it is impossible to determine whether the discharge provided for in the Plan is actually appropriate. 11 U.S.C. § 1141(d)(3).

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[4] As Debtors explain, reclamation of mines no longer in use is a legal obligation arising out of the Surface Mining and Reclamation Act of 1977 and similar state statutes. (*See* Disclosure Statement at 16.) Debtors estimate that the cost of complying with its reclamation obligations will be "significantly higher" than $683 Million. *Id.* at 16, n.2.

The Disclosure Statement Lacks a
Liquidation Analysis and Financial Projections

15. According to the Disclosure Statement, a liquidation analysis is contained in Exhibit C to the Disclosure Statement and financial projections of the Reorganized Debtor are contained in Exhibit D to the Disclosure Statement.[5]

16. Neither of these exhibits is actually attached to the Disclosure Statement that was filed with the Court. Even assuming some form of these exhibits is attached to the version of the Disclosure Statement that is ultimately circulated, the parties entitled to review, comment upon and object to the statement prior to circulation pursuant to Rule 3017 of the Federal Rules of Bankruptcy Procedure are denied the ability to review, comment upon and object to those.

17. This information is not contained anywhere else in the Disclosure Statement.

18. Accordingly, the parties in interest entitled to vote are denied essential information necessary to make an informed decision as to whether to vote to accept or reject the plan.

19. Until those documents have been filed and made available for review, the Disclosure Statement cannot be approved.

20. Moreover, Rule 3017(a) requires at least 28 days' notice *after* a disclosure statement the filed before a hearing on that disclosure statement can occur. Alpha cannot

[5] According to the Disclosure Statement, the Liquidation Analysis also provides the assumptions used in its development. (*See* Disclosure Statement at 53.)

avoid that requirement by submitting a partial disclosure statement and adding to it less than 28 days before the hearing.

21. The current hearing on the Disclosure Statement is May 17, 2016. Even if Alpha files the missing exhibits today, that does not provide the required 28 days' notice.

Alpha Has Not Supported the Releases and Exculpatory Clauses

22. Both the Disclosure Statement and the Plan contain provisions for the release and exculpation of various non-debtor parties by other non-debtor parties from all sorts of liability. (*See* Disclosure Statement at 55-56, 58.) As described more fully below, Alpha has not demonstrated the appropriateness of these provisions.

23. Without reciting the releases and exculpatory clauses in their entirety, the release clauses cause all of Alpha's creditors and the holders of any claim against Alpha to release and hold harmless the following non-debtor parties (hereafter, the "Released Parties") from any liability for anything occurring prior to the Effective Date:

(a) The DIP Agents;
(b) The DIP Lenders;
(c) The First Lien Agent;
(d) The First Lien Lenders;
(e) Any entity created by the First Lien Lenders to facilitate a successful credit bid of any of Debtors' assets; and
(f) Any Affiliate or Representative of any of these parties.

(*See* Disclosure Statement at 58.)

24. The exculpation clause is even broader. It provides that the Released Parties are free from liability to any "Person" (defined as "any individual, firm,

corporation, partnership limited liability company, joint venture, association, trust, unincorporated organization or other entity"). (*See* Disclosure Statement at 58.)

25. If the Court has some difficulty determining who precisely is being released and exculpated, that is because nowhere in the Disclosure Statement or in any other publicly available documents are the actual identities of the Released Parties' members disclosed.[6]

26. Moreover, these parties are not debtors, have not fulfilled the obligations of debtors under the bankruptcy code and, thus, have provided no basis for receiving the equivalent of a bankruptcy discharge.

27. Although there is no *per se* prohibition against imposing releases of non-debtors by other non-debtors (such as, in this case, the release by creditors of the DIP Agent or the First Lien Agent), those releases are not appropriate in every case, or even in most cases. *See In re A.H. Robins Co., Inc.*, 880 F.2d 694, 702 (4th Cir. 1989). Whether such releases and exculpatory clauses are appropriate is dependent upon the facts and circumstances of each particular case. *Behrmann v. National Heritage Foundation*, 633 F.3d 704, 711 (4th Cir. 2011). Approval of non-debtor releases and exculpatory clauses "should be granted cautiously and infrequently." *Id.* at 712.

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[6] For example, according to the DIP Financing Agreement (Doc. 27), the DIP Lenders include "each financial institution listed on Schedule 1.01(b) to [the DIP Financing Agreement], as well as any person that becomes a 'Lender' hereunder pursuant to Section 2.23 or 11.04 and shall also include, as the contract may require, any Issuing Bank in its capacity as such." (*See* Doc 27 at 175 of 315.) Schedule 1.01(b), however, was not actually filed along with the DIP Financing Agreement. At the time the Final DIP Order was entered (Doc. 465), Schedule 1.01(b) simply provided "N/A as of Effective Date." No subsequent list of DIP Lenders has been filed publicly either. Thus, as just one example, creditors have no ability to know who constitutes the DIP Lenders being released under this Plan.

28. In *Behrmann*, the Fourth Circuit enumerated several factors that should be considered in determining whether third-party releases and exculpatory clauses are appropriate, including but not limited to the following:

(a) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;

(b) The non-debtor has contributed substantial assets to the reorganization;

(c) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;

(d) The impacted class, or classes, has overwhelmingly voted to accept the plan;

(e) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;

(f) The plan provides an opportunity for those claimants who choose not to settle to recover in full;

(g) The bankruptcy court made a record of specific factual findings that support its conclusions;

(h) A close connection between the causes of action against the third party and the causes of action against the debtor; and

(i) The plan of reorganization provides for payment of substantially all of the claims affected by the injunction.[7]

29. In *Behrmann*, the Court also made clear that in order to support these types of releases, the Bankruptcy Court must "find facts sufficient to support its legal

[7] The Fourth Circuit compiled this non-exhaustive list from *Class Five Nev. Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 649, 658 (6th Cir. 2002), and *In re Railworks Corp.*, 345 B.R. 529, 536 (Bankr. D. Md. 2006). The Fourth Circuit described these factors as "instructive." *Behrmann*, 663 F.3d at 712.

conclusion that a particular debtor's circumstances entitle it to such relief." *Behrmann*, 663 F.3d at 706-07. Indeed, in *Behrmann*, the Fourth Circuit reversed the bankruptcy court's legal conclusion that the releases at issue there were:

> (1) "essential" to NHF's reorganization and appropriate given NHF's "unique circumstances"; (2) an "essential means" of implementing the Confirmed Plan; (3) an "integral element" of the transactions contemplated in the Confirmed Plan; (4) a "material benefit" for NHF, its bankruptcy estate, and its creditors; (5) "important" to the Confirmed Plan's overall objectives; and (6) consistent with applicable provisions of the Bankruptcy Code,

and that

> (1) NHF's bankruptcy was "quite a unique case"; (2) there were "legitimate interests" for approving the Release Provisions in the reorganization plan; (3) the "potential for mischief" was "very, very high" for a dissatisfied party whose claim was disallowed in the bankruptcy proceeding to sue NHF's officers and directors "seriatim"; (4) NHF's obligations to indemnify its officers and directors could cause it to incur substantial legal costs in defending such claims; and (5) the Release Provisions served the purpose of "preventing an end-run around the plan" by not allowing dissatisfied claimants to attempt "second and third bites at the apple in another forum,"

because the Court failed to support its conclusions with concrete factual findings. *Id.* at 708, 712-13 (record citations omitted).[8] On remand, the Bankruptcy Court, applying the factors set forth the *Behrmann* opinion, determined that the facts did not support allowing the releases. That finding was affirmed by both the District Court and the Fourth Circuit.

[8] According to the Fourth Circuit, the Bankruptcy Court's conclusions were "meaningless in the absence of specific factual findings explaining" them. *Behrmann*, 663 F.3d at 713. Thus, among the Fourth Circuit's instructions to the Bankruptcy Court on remand was, "to set forth specific factual findings supporting its conclusions." *Id.*

National Heritage Foundation, Inc. v. Highbourne Foundation, 760 F.3d 344, 347, 352 (4th Cir., 2014).

30. Thus, it is clear that a plan containing such release provisions cannot be confirmed in the absence of a significant evidentiary presentation demonstrating facts supporting such relief. *Behrmann*, 663 F.3d at 713.

31. Because at this time, Alpha has not yet presented the factual and evidentiary support for the proposed release provisions, the United States Trustee is not in a position to support or oppose the release provisions. Nevertheless, a Disclosure Statement that does not set forth the factual underpinning to support releases such as those included in the Plan lacks adequate information.

32. Moreover, to the extent this is in fact a liquidating plan rather than a plan of reorganization, and to the extent Alpha is ceasing its operations after the sale of its core and non-core assets, it would be difficult, if not impossible, to justify the confirmation of a plan including such release provisions. In fact, in a similar case involving a liquidating plan, this Court, noting "the Release Provision is not essential to the Debtor's reorganization," denied confirmation of a proposed Plan with a similar release provision. *In re Neogenix Oncology, Inc.*, 508 B.R. 345, 359 (Bankr. D. Md. 2014).

The Exculpation Clauses are
Impermissibly Broad and Lack the Required Exception for Court Approved Suits.

33. In addition to the fact that entitlement to the exculpation provisions has not been demonstrated, the exculpation clause here is impermissibly broad on its face

because, *inter alia*, (i) it is too broad in respect to who is exculpated (for example, it exculpates creditors such as the First Lien Lenders), and (ii) it does not provide an exception allowing for suits against the released parties where prior court approval is obtained.

34. In *In re National Heritage Foundation, Inc.*, 478 B.R. 216 (Bankr. E.D. Va. 2012), *aff'd, National Heritage Foundation v. Highbourne Foundation*, 760 F.3d 344 (4th Cir. 2014), the court addressed exculpation clauses such as the one in this Plan. There, the court recognized that exculpation provision are permissible only if they are "properly limited and not over broad." *Id.* at 234.

35. In order to avoid over-breadth, exculpation clauses must be:

(a) narrowly tailored to meet the needs of the bankruptcy estate;

(b) limited to parties who have performed necessary and valuable duties in connection with the case;

(c) limited to acts and omissions taken in connection with the bankruptcy case; and

(d) must not purport to release any pre-petition claims;

Id.

36. Here, the clause is not narrowly tailored to meet the needs of the bankruptcy estate and is not limited to parties who have performed necessary and valuable duties in connection with the case.

37. For example, the First Lien Lenders are creditors. They have no place in an exculpation clause. Similarly, NewCo is simply an entity that may be formed to act as

bidder on Alpha's assets and may or may not be the winning bidder.[9] It too has no place in an exculpation clause.

38. Finally, to be permissible, an exculpation clause must contain a "gatekeeper function by which the Court may, in its discretion, permit an action to go forward against the exculpated parties." *National Heritage*, 478 B.R. at 234.

39. The exculpation clause here contains no such exception.

Governmental Claims Should Be Excepted
From The Exculpation And Release Clauses.

40. To the extent that the Court allows for any releases or injunctions to either the Debtors or non-debtor third parties, the United States Trustee requests that language carving out Governmental claims from the proposed releases be included. At a minimum, language in substantially the form set forth below should be added to the Disclosure Statement and Plan substantially in the form set forth below:

> Nothing in the Confirmation Order or the Plan shall effect a release of any claim by the United States Government or any of its agencies or any state and local authority whatsoever, including without limitation any claim arising under the Internal Revenue Code or any criminal laws of the United States or any state and local authority against the Released Parties or Exculpated Parties, nor shall anything in the Confirmation Order or the Plan enjoin the United States or any state or local authority from bringing any claim, suit, action or other proceedings against the released parties for any liability whatever, including without limitation any claim, suit or action arising under the Internal Revenue Code or any

[9] Newco is defined as "[a]ny entity created by the First Lien Lenders to facilitate a successful credit bid of any of Debtors' assets." (*See* Plan at 11.)

> criminal laws of the United States or any state or local authority, nor shall anything in the Confirmation Order or the Plan exculpate any party from any liability to the United States Government or any of its agencies or any state and local authority whatsoever, including any liabilities arising under the Internal Revenue Code or any criminal laws of the United States or any state and local authority against the released parties.

The Disclosure Statement Lacks
Adequate Information Regarding the First Lien Lender Settlement

41. The Plan defines the "First Lien Lender Settlement" as:

> a settlement among the DIP Lenders, the DIP Agents, the First Lien Lenders and the debtors, entered into for mutual consideration including: (a) the establishment of (i) the amount, form and sources of funding of the First Lien Lender Exit Contribution, (ii) the form of the First Lien Lender Distribution and (iii) the amount of Allowed Secured First Lien Lender Claims; (b) the incorporation of the Unencumbered Assets Settlement and the Diminution Claim Allowance Settlement; and (c) the entry of a Bidding Procedures Order providing for a stalking horse bid by the First Lien Lenders.

(*See* Plan at 8-9.)

42. The First Lien Lender Settlement is not attached to the Disclosure Statement or apparently otherwise publicly available. Additionally, the terms of the First Lien Lender Settlement are not disclosed in the Disclosure Statement and are apparently not otherwise publicly available.

43. Nevertheless, nearly every aspect of the Plan is governed by the undisclosed terms of the First Lien Lender Settlement. For example, under the terms of the Plan, the general unsecured claimants (class 6), an impaired class entitled to vote on

the Plan, will receive "a Pro Rata share of any assets contributed to the General Unsecured Claims Asset Pool." (*See* Plan at 21.)

44. The General Unsecured Claims Asset Pool, however, includes "consideration in the form and amount to be determined pursuant to the First Lien Lender Settlement." (*See* Plan at 9.) Thus, general unsecured creditors cannot begin to analyze their treatment under the Plan because they have no way to determine the makeup of the "pot" from which they share.

45. Similarly, the Secured Second Lien Noteholders (Class 3), an impaired class entitled to vote on the Plan, are to receive a "Pro Rata share of the Second Lien Noteholder Distribution." (*See* Plan at 20.) But again, the "Second Lien Noteholder Distribution" is comprised *entirely* of "consideration in a form and amount to be determined pursuant to the First Lien Lender Settlement," and that distribution is funded by "the First Lien Lender Exit Contribution," which in turn is again *entirely* determined by the undisclosed terms of the First Lien Lender Settlement. (*See* Plan at 8, 14.)

46. Particularly disturbing, though, is how this impacts the treatment of the Secured First Lien Lender Claims. In essence, the First Lien Lenders themselves determine how much they will be paid under Plan based on the undisclosed terms of the First Lien Lender Settlement. (*See* Plan at 20.) No other party in interest has any way to analyze the fairness or appropriateness of the First Lien Lender's treatment under the Plan.

47. These examples are not exhaustive. A comprehensive review of the Plan indicates that it is essentially entirely governed by the First Lien Lender Settlement.

48. Without complete disclosure of the terms of the First Lien Lender Settlement, the Disclosure Statement lacks adequate information.

49. Moreover, at the May 2, 2016, omnibus hearing, Alpha represented that the First Lien Lender Settlement was going to be replaced with a new broader settlement including additional parties. This will significantly impact the Plan and Disclosure Statement.

50. To the extent a new settlement is going to replace the First Lien Lender Settlement, an entirely new Plan and Disclosure Statement will be required and any such amended disclosure statement cannot be considered at the May 17, 2016 hearing because it does not provide for the 28 days' notice period required by Rule 3017.

Reservation of Rights

51. The deficiencies described above are exemplary only and may not constitute every deficiency in the Disclosure Statement.

52. The United States Trustee reserves the right to object to other provisions, or lack of provisions, in the Disclosure Statement at any hearing on the Disclosure Statement or in future amended disclosure statements.

CONCLUSION

The Disclosure Statement does not contain adequate information as defined by the Bankruptcy Code. For this reason, the Disclosure Statement should be disapproved.

Respectfully Submitted,

Dated: May 10, 2016

Judy A. Robbins
United States Trustee, Region Four

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May 2016, a copy of the foregoing opposition was served by electronic mail to each of the following parties (those parties identified on the Master Service List with e-mail addresses), to:

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